United States Department of State

Washington, D.C. 20520

March 19, 2014

By email

Mr. Yves Derains
The Hon. Michael Chertoff
Mr. Vaughan Lowe, Q.C.
c/o Ms. Evgeniya Goriatcheva
Permanent Court of Arbitration
Peace Palace
Carnegieplein 2
2517 KJ The Hague
The Netherlands

Re: ***Detroit Bridge International Company v. Government of Canada,***
PCA Case No. 2012-25

Dear Members of the Tribunal,

We received yesterday evening Procedural Order No. 6 in the above-noted arbitration, in which the Tribunal decided to exclude the non-disputing NAFTA Parties from the jurisdictional hearing scheduled for March 20 and 21. We respectfully request that the Tribunal reconsider its decision, which is (1) inconsistent with the NAFTA; (2) contrary to the unanimous practice of other NAFTA tribunals; and (3) prejudicial to the treaty rights of the non-disputing Parties.[1]

First, the Tribunal's decision is inconsistent with NAFTA Chapter Eleven. NAFTA Article 1128 addresses the rights of non-disputing Parties in disputes under NAFTA's investment chapter. It states: "On written notice to the disputing parties, a Party may make *submissions* to a Tribunal on a question of interpretation of this Agreement."[2] As a leading commentary on

[1] In the NAFTA, as in the United States Model Bilateral Investment Treaty, "non-disputing Party" means "non-disputing treaty Party," as opposed to another third party to the arbitration. *See, e.g.*, Elöise Obadia, *Extension of Proceedings Beyond the Original Parties: Non-Disputing Party Participation in Investment Arbitration*, 22 ICSID REV.—FOR. INV. L.J. 349, n.1 (2007) ("The expression 'non-disputing Party' used in the U.S. Model BIT should for its part be distinguished from the one used in the ICSID Rules and Articles. In the former system, 'non-disputing Party' is a State Party to the BIT that is not involved in the dispute but which, under Article 28(2) of the 2004 Model BIT, is entitled to make oral and written submissions to the tribunal on the interpretation of the Treaty. In the latter system, the term 'non-disputing party' refers to a person or entity that is neither a disputing party nor a party to the treaty on which consent to arbitration is based, that nevertheless has an interest in the dispute . . . .").

[2] Emphasis added. To be clear, the United States is not at this time providing notice under Article 1128 that it wishes to make an oral or post-hearing submission. The United States cannot know whether the exercise of its

NAFTA Chapter Eleven has observed: "Most Chapter 11 tribunals have recognized that Article 1128 confers an absolute right on the non-disputing Parties to intervene on questions of interpretation, and is not merely a matter for the discretion of the tribunal in an individual case."[3]

The purpose of non-disputing Party submissions is to enable other treaty Parties to provide views on the proper interpretation of the treaty, thereby "promot[ing] a balanced and long-term interpretation of the treaty."[4] The only limitation in Article 1128 is that the submission be preceded by written notice, which the non-disputing Party may provide at any time.

By its terms, Article 1128 is not limited to written submissions.[5] To the contrary, the tribunal in *ADF v. United States* correctly observed that "[t]he parties recognize that the Governments of Canada and Mexico have the right to make written and *oral* submissions pursuant to NAFTA Article 1128."[6] Accordingly, the United States has exercised its right to make oral submissions in prior NAFTA Chapter Eleven arbitrations.[7]

Further, Article 1128 does not limit the number of submissions that a non-disputing Party may make. Non-disputing Parties, in fact, routinely make multiple submissions in NAFTA Chapter Eleven arbitrations.[8] In *Pope & Talbot v. Canada*, for instance, the United States made eight non-disputing Party submissions.[9] In *Methanex Corp. v. United States*, Canada and Mexico each made four non-disputing Party submissions.[10] Mexico and the United States thus

---

rights under Article 1128 in an oral or post-hearing submission is necessary or appropriate without attending the hearing.

[3] MEG N. KINNEAR ET AL., INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER 11, 1128-1, 1128-2 (citing *Ethyl Corp. v. Canada*, UNCITRAL, Award on Jurisdiction ¶¶ 35, 48 n. 15 (June 24, 1998); Martin Hunter & Alexei Barbuk, *Procedural Aspects of Non-Disputing Party Interventions in Chapter 11 Arbitrations*, *in* NAFTA INVESTMENT LAW AND ARBITRATION: PAST ISSUES, CURRENT PRACTICE, FUTURE PROSPECTS 152, 171, 172 (T. Weiler ed., 2004)).

[4] Gabrielle Kaufmann-Kohler, *Non-Disputing State Submissions in Investment Arbitration: Resurgence of Diplomatic Protection?*, *In* DIPLOMATIC AND JUDICIAL MEANS OF DISPUTE RESOLUTION, 305, 313 (L. Boisson de Chazourne et al. eds., 2012)

[5] Indeed, more recent U.S. international investment agreements have clarified that, in this context, "submission" means written or oral submission. *See, e.g.*, CAFTA-DR art. 10.20(2) ("A non-disputing Party may make oral and written submissions to the tribunal regarding the interpretation of this Agreement.").

[6] *ADF Group Inc. v. United States*, ICSID Case No. ARB(AF)/00/1, Minutes of the First Session of the Tribunal ¶ 15 (Feb. 3, 2001) (quoted in Kinnear et al., *supra* note 3, at 1128-2) (emphasis added).

[7] *See, e.g., Bayview Irrigation District et al. v. United Mexican States*, ICSID Case No. ARB (AF)/05/01, Transcript of Hearing on Jurisdiction, Day 2, at 328-31 (Nov. 15, 2006) (intervention by the United States to address NAFTA Chapter Eleven's territoriality requirement).

[8] *See, e.g.*, Kaufmann-Kohler, *supra* note 4, at 311 n. 27 ("In proceedings under NAFTA, there have been more than 50 submissions pursuant to Art. 1128, rather evenly distributed between the three contracting States. In certain cases, States have filed several Article 1128-submissions in the same arbitration.") (citations omitted).

[9] *See* http://www.state.gov/s/l/c3747.htm.

[10] *See* http://www.state.gov/s/l/c5818.htm.

by no means exhausted their rights under Article 1128 by each filing one non-disputing Party submission in this arbitration.

Article 1128, moreover, does not restrict the timing of non-disputing Party submissions. Non-disputing Parties thus have made submissions under Article 1128 throughout the arbitral proceedings, including after the oral hearing on the merits.[11]

Nothing in the applicable arbitration rules restricts the NAFTA Parties' rights in this regard. NAFTA Article 1120 authorizes a claimant to select the UNCITRAL Arbitration Rules "except to the extent modified by this Section." Although Article 28(3) of the UNCITRAL Rules provides for *in camera* hearings, that rule necessarily is subject to relevant modifications under the treaty. Because Article 1128 permits non-disputing Parties to make both *oral* and *post-hearing* submissions on subjects raised during the hearing, it should be deemed to have modified Article 28(3). The disputing parties' agreement to the UNCITRAL Rules for this dispute, including Article 28(3), cannot modify the treaty terms or abrogate the other treaty Parties' rights under Article 1128. Indeed, the NAFTA Free Trade Commission has issued a binding interpretation of the NAFTA confirming that "[n]othing in the NAFTA imposes a general duty of confidentiality on the disputing parties to a NAFTA Chapter Eleven arbitration . . . ."[12]

Second, the Tribunal's decision is contrary to the uniform practice of NAFTA Chapter Eleven tribunals.[13] Indeed, we are not aware of a single NAFTA Chapter Eleven arbitration (including those conducted under the UNCITRAL Rules) in which a tribunal excluded the non-disputing Parties from oral hearings. Ordinarily, in fact, non-disputing Parties are not even required to seek permission to attend NAFTA Chapter Eleven hearings. Instead, the tribunal secretary customarily apprises non-disputing Parties of the date and location of the hearing, and then requests the names of attendees from each non-disputing NAFTA Party. In light of this

---

[11] *See, e.g.*, *Bayview Irrigation District et al. v. United Mexican States*, ICSID Case No. ARB(AF)/05/1, Award ¶ 21 (June 19, 2007) (noting the United States' filing of a non-disputing Party submission after the hearing, as requested by the tribunal in that case); *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Eighth Submission of the United States (Dec. 3, 2001) (submitted after hearing on merits, responding to arguments made and tribunal questions posed at the hearing).

[12] Note of Interpretation of the Free Trade Commission ¶ A(1) ("Access to Documents") (July 31, 2001), http://www.state.gov/documents/organization/38790.pdf; *see also* NAFTA art. 1129 (granting non-disputing Parties the right to obtain copies of the disputing parties' pleadings and evidence).

[13] *See, e.g., GAMI Investments, Inc. v. United Mexican States*, UNCITRAL, Award ¶¶ 7, 11 (Nov. 15, 2004) ("Mexico raised jurisdictional objections. They were the subject of a special hearing on 17 September 2003. . . in the course of which counsel addressed the Tribunal and answered questions put to them by the arbitrators. . . . Representatives of Canada and the United States of America were present . . . . Both sent representatives to the Hearing on Jurisdiction and the Final Hearings in Washington."); *see also United Parcel Service of America, Inc. v. Government of Canada*, UNCITRAL, Transcript, Hearing on the Merits, vol. 1, at 5 (Dec. 12, 2005) (noting appearances by representatives of the United States and Mexico); *Apotex Inc. v. United States*, UNCITRAL, Transcript, First Session of the Arbitral Tribunal, vol. 1, at 5 (Feb. 15, 2012) (noting appearances by representatives of Canada and Mexico); *Grand River Enterprises v. United States*, UNCITRAL, Transcript, Hearing on the Merits, vol. 1, at 5 (Feb. 1, 2010) (noting appearances by representatives of Canada and Mexico).

longstanding practice, the Tribunal's eleventh-hour procedural order excluding non-disputing Party participation is all the more surprising.

Third, the Tribunal's decision is prejudicial to the non-disputing Parties. NAFTA Parties must be permitted to attend oral hearings in cases in which they are not the respondent State if they are to effectively exercise their right to interpret the treaty. New issues may arise during the hearing,[14] and even prior submissions may be characterized in a manner warranting additional non-disputing Party submissions.[15] To deprive non-disputing Parties of the ability to attend oral hearings is to deprive them of an important aspect of their right to make "submissions" under Article 1128.

Allowing the non-disputing Parties to attend the hearing, by contrast, would not prejudice the claimant. We are not aware of any significant, overriding confidentiality considerations that require excluding non-disputing Parties. The Counter-Memorial, Reply, and Rejoinder in the jurisdictional phase of this arbitration already have been published in full on Canada's website. The claimant apparently agreed to the publication of these documents without any redactions. The published Memorial includes just four redactions, all of which relate to information from prior proceedings in this arbitration, rather than confidential business information.[16] In previous NAFTA Chapter Eleven arbitrations, moreover, non-disputing Parties have not been excluded from the hearing even during discussions of confidential or otherwise protected information. In any event, tribunals should address confidentiality issues as they arise during oral hearings, rather than through blanket exclusions of treaty Parties. In a public arbitration against a State, the Tribunal should not simply elevate a claimant's preference for a private hearing above all other interests, including the rights and interests of non-disputing treaty Parties.

[14] Indeed, at the oral hearing in *Bayview v. Mexico*, the tribunal directed treaty interpretation questions to the NAFTA Parties for post-hearing submissions. *Bayview* Award ¶ 18.

[15] In the recent arbitration *Teco Holdings Guatemala LLC v. Guatemala*, the United States, as a non-disputing Party, exercised its right under CAFTA-DR Article 10.20(2) to make an oral submission clarifying its previous written submission.

[16] *See* Government of Canada Memorial on Jurisdiction and Admissibility, June 15, 2013 (redactions in paragraphs 307 and 309, and footnotes 426 and 431, referring to arguments made at a procedural hearing).

For these reasons, we respectfully request the Tribunal to reconsider its decision and, consistent with every NAFTA Chapter Eleven arbitral tribunal ever constituted, allow the non-disputing Parties to attend oral hearings in this arbitration.

Respectfully submitted,

Lisa J. Grosh
Assistant Legal Adviser

Copies:
Mr. Carlos Vejar Borrego (Government of Mexico)
Mr. Aristeo López Sánchez (Government of Mexico)
Ms. Sylvie Tabet (Government of Canada)
Mr. Mark Luz (Government of Canada)
Mr. Jonathan Schiller (claimant)
Ms. Evgeniya Goriatcheva (PCA)